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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 201

CENTRAL ICE CREAM COMPANY, A CORPORATION,
Petitioner,

vs.

GOLDENROD ICE CREAM COMPANY, A CORPORATION,
Respondent.

BRIEF OF GOLDENROD ICE CREAM COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE SOUTHROP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT OF THE CASE.

The cause was tried before the District Court on a stipulation of facts. This Stipulation is set forth in Appendix V, p. xxiii, to the petition, and we make reference to that Stipulation for an accurate and full factual recitation rather than point out piece-meal inaccuracies in petitioner's statement. Reference is also made to the District Court's opinion containing findings of fact and conclusions of law, Appendix III, p. v, to the petition, 184 F. Supp. 312; also to the opinion of the Court of Appeals, Appendix VI, p. liii, 287 F. 2d 265.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED AND ARGUMENT.

The issue presented by this petition is not one, under the facts here, of general importance. There is no conflict of decisions.

Petitioner first started the cause in a state court of Illinois, complaining of the same actions, in substance, as it complains of in this proceeding. It was there unsuccessful (Stip. Appendix V, par. 22, p. xxxi). Then it went to the Federal Court alleging anti-trust and other statutory violations.

When the cause was tried on the merits, petitioner abandoned reliance upon all of the anti-trust laws and other asserted laws with the exception of Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, Title 15 U. S. C. A. § 13(a)-(f) and pitched its claim *exclusively* on that section. (District Court's findings and conclusions, Appendix IV, p. v, and par. 1 of the Stip. Appendix V, pp. xxiii and xxiv and opinion of Court of Appeals). We hereinafter refer to the statute as the Robinson-Patman Act. Petitioner cannot now by the assumptions and questions it poses and by reference to the *unamended* Clayton Act escape the clear and certain requirements of the Act it relied wholly upon in the Courts below, namely the Clayton Act as amended by Robinson-Patman. Having failed in the state court, the District Court and the Court of Appeals, petitioner now seeks to create in this Court a Federal matter out of a purely local competitive situation.

1. The Question Presented and Holdings Below.

The single question therefore is: Did the Courts below on the stipulated facts correctly decide that respondent had not violated the proscriptions of the Robinson-Patman Act? The statute, 15 U. S. C. A. § 13(a) provides in part:

> "It shall be unlawful for any person *engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce* * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * *."[1] (Italics ours.)

Robinson-Patman is a pricing statute, and Sherman Act and unamended Clayton Act cases, relied on by petitioner, are wholly inapplicable. The District Court considered each of the requirements clearly set forth in the statute, and on the facts found and concluded (a) that respondent was not engaged in commerce; (b) that it did not in the course of any commerce, either directly or indirectly, discriminate in price between different purchasers of commodities of like grade and quality; (c) that there was no impact on commerce and that there was no substantial lessening of competition or tendency to create a monopoly in any line of commerce;[2] (d) that respondent is not "a conduit" for the flow of ice cream into any commerce. It pointed out that the discriminatory sales talked about in the petition were solely local, that is, within Chicago, Illinois.

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1. The statutory provision is set forth in full at page 5 of the petition and in the opinion of the District Court, Appendix III, p. v.

2. Petitioner's interstate business was trifling: 99.975% of its sales and deliveries of ice cream were wholly local.

The Court of Appeals, also on the facts, held that the finding and conclusion of the District Court that there was no price discrimination in the course of commerce was fully supported by the record. That Court properly pointed out that by the express terms of the statute it is essential, to establish a violation, that a discrimination in price be in the course of commerce between different purchasers of commodities of like grade and quality; that at least one of the purchases involved in such discrimination be a purchase in interstate commerce; that the concurrence of these requisite factors *was lacking in the instant case*. It also found that the only sales of like grade and quality *here* were solely in *intrastate* commerce. Courts and text writers dealing with Robinson-Patman are in accord with the tests set forth in the opinions below (Appendix III, pp. v, xiv).

2. Respondent Made No Interstate Sales and Did Not in the Course of Commerce Discriminate in Price Between Different Purchasers of Commodities of Like Grade and Quality.

By the Stipulation petitioner agreed that respondent made no interstate sales of ice cream. It admits there was no discrimination in price between different purchasers of a commodity of "like grade and quality." It was stipulated (par. 5, Stip., Appendix V, p. xxv) *that at all times respondent sold and delivered its ice cream solely within the state of Illinois and has no ice cream business of any kind or nature outside of Illinois.*

Petitioner asserts respondent went astray of Robinson-Patman because it, through Chicago brokers, bought some butterfat that originated outside of Illinois. Petitioner's elaborate presentation of the "importation of ingredients" theory is out of place in a matter confined to the price discrimination provisions of Robinson-Patman.

The importation of ingredients in no wise constituted the sale of a commodity *in the course of commerce*. This butterfat was, with other ingredients, made into ice cream by respondent in its Chicago plant and such ice cream was sold by respondent *only within Illinois*.

Petitioner's belief that a manufacturer which purchases some raw materials outside the state and brings them into Illinois, and converts them into a product *for local sales only*, is amenable to the Robinson-Patman Act, irrespective of *all* that Act's specific requirements, does violence to the clear language of the Act itself. In making this argument, petitioner refuses, as it did below, to distinguish between the proscriptions of the Sherman Act against conspiracies, boycotts and monopolies and the specific price discrimination provisions of Robinson-Patman; thus it resorts in the petition to inapplicable Sherman Act cases.

Petitioner gives a misleading picture of the transactions between respondent and Fred Harvey. It is contrary to the stipulated facts. Petitioner admits that the sales to Harvey were not, as it puts it, "discriminatively favorable." It also concedes that this ice cream was not of the same "grade and quality" as that sold by respondent to any other customer. The true facts with respect to Harvey are set forth in paragraphs 11, 12 and 16 of the Stipulation (Appendix V, p. xxvi).

From this Stipulation it will be seen (1) that sales and deliveries of ice cream to Fred Harvey were made solely in Chicago, Illinois, for use by Harvey in its restaurants in Chicago; a portion of the total ice cream which was sold and delivered by respondent to Harvey went to Harvey's commissary in Chicago; (2) there Harvey itself, and *not respondent*, *resold* the ice cream so sold and delivered at its commissary to a railroad company for use in its dining cars; (3) that after this sale and delivery to Harvey

at its commissary in Chicago, respondent exercised no control or dominion over the use, resale or disposition of the ice cream by Harvey; and (4) that respondent had no contact or dealings, contractual or otherwise, with the railroad company and that respondent placed no ice cream whatsoever in dining cars for consumption or use by anyone.

This Stipulation further shows (Stip. par. 12, Appendix p. xxviii) that none of the ice cream which respondent sells to Fred Harvey is of the same or like grade and quality sold by respondent to any other customer but is made to the Harvey special formula and is richer in butterfat.

3. The Moore Case Is Not Applicable on the Facts Here.

Since respondent made no interstate sales or deliveries it had no recourse to the fruits of any interstate business. It had no interstate business through which to hurt a local competitor The exact opposite was true in *Moore* v. *Mead*, 348 U. S. 115. In that case this Court made it clear that all the requisite elements of a Robinson-Patman violation were present. There defendant, as this Court held, sold bread, *both locally and interstate*, and was found to have violated the Robinson-Patman Act because it discriminated in price, *lowering the price at local levels and maintaining a higher price in its interstate sales*, thereby using the fruits of the discriminatory interstate activities to crush a local competitor. As the Court said, p. 118:

> "• • • Respondent (defendant) is engaged in commerce, selling bread both locally and interstate."

(See also the observations of the District Court and the Court of Appeals on the *Moore* case in their respective opinions.) Despite all petitioner says about the record in *Moore*, this Court held that the facts showed that Mead

made price discriminations in the course of commerce and *petitioner concedes* (petition, p. 24) that Mead made *interstate* sales during a part of the period covering the so-called price war.

4. The Local Competitive Situation.

With respect to all petitioner asserts about the highly competitive local situation in the sale of ice cream in Chicago, Illinois, we make reference to paragraphs 18, 19, 20 and 21 of the Stipulation (Appendix V, pp. xxx, xxxi). It will be noted from the Stipulation (Appendix V, pars. 19 and 20, p. xxxi) that both petitioner and respondent have with other competitors followed certain competitive practices in the sale of their products in the Chicago area and have been compelled to do so *to meet competition* in Chicago.

The notion urged in the petition that the company which successfully bids for the annual school board ice cream contract has a monopoly subject to the proscriptions of the Robinson-Patman Act is, respectfully, utter nonsense. This is a purely local matter. Furthermore, petitioner has conceded, contrary to its allegations in the complaint, that that contract is not financed in any respect by Federal funds (Petition, p. 12, footnote 1; see also Stip. Appendix V, p. xxv, par. 6). In any event, petitioner, not respondent, got the contract. As a matter of fact, bids were received from the petitioner, from respondent and from several other ice cream companies (par. 7, p. xxv, Stip.). Respondent's officers could hardly have been so naive as to try to assure respondent of a contract by discouraging petitioner alone from bidding when there were many other potential and actual bidders.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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